

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

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77-6033

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United States Court of Appeals
FOR THE SECOND CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

—v.—

AMERICAN EXPRESS COMPANY,
Defendant-Appellant.

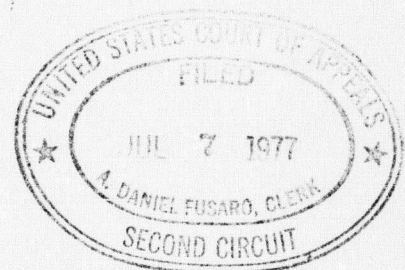
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC**

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No. 77-6033

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Plaintiff-Appellee,

v.

AMERICAN EXPRESS COMPANY,

Defendant-Appellant.

PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT:

Appellant American Express Company respectfully submits this petition for rehearing and suggestion for rehearing in banc pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure.

The decision herein (per Mulligan, C.J., Moore and Smith, C.J.J. concurring) is in clear and pronounced conflict with a decision of the Supreme Court rendered since the argument of this appeal and with prior decisions of this Court, all in closely analogous cases. Abney v. United States, ___ U.S. ___ 45 U.S.L.W. 4594 (June 9, 1977); Local 771, I.A.T.S.E. v. RKO General, Inc., WOR Division, 546 F.2d 1107 (2d Cir. March 3, 1977); United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975);

United States v. Alessi, 536 F.2d 978 (2d Cir. 1976).

In this case and the cases cited above, the appellants claimed a special right to be free of the burdens of multiple litigation on the same claim or charge. In all the cases cited above, but not in the present case, the Supreme Court and this Court recognized a right of appeal from the denial of such a claim under Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949). They did so because the failure to vindicate a claim to protection against duplicative litigation at the outset of the litigation finally denies that protection as a practical matter. The injury cannot be corrected on final appeal after the party seeking protection has already suffered all the risks and burdens of defending both lawsuits.

In this case, in violation of the jurisdictional and procedural provisions of Title VII of the Civil Rights Act of 1964, defendant has been sued for a second time on the same charge of employment discrimination. This suit by the Equal Employment Opportunity Commission followed a prior private action by the employee involved, which had been settled. Appellant asserts that Title VII prohibits a suit by the EEOC on the same charge after a private action has been commenced, and restricts the EEOC to intervention in the private action, in order to prevent the harassment of employers by multiple proceedings. Six other Courts of Appeals have passed upon the issue and have divided evenly (see p. 12 below). It is a question of first impression in this Court.

By misconstruing the thrust of this appeal, the panel was able to treat it as a simple claim of lack of jurisdiction in the District Court, without referring to appellant's basic claim of protection against multiple litigation. Thus, the panel inaccurately summarized appellant's claim as follows:

"Essentially, Amex claims that the district court has no jurisdiction of an EEOC action when suit on the same charge of discrimination has been filed by the employee. Since the issue is purely jurisdictional and does not involve the merits, it is a collateral issue allegedly making Cohen applicable."
(slip op. at 4420).

The panel incorrectly stated that the basis for Cohen jurisdiction is the "purely jurisdictional" character of the issue. Thus it was able to dismiss the appeal with the obvious response that jurisdictional rulings in and of themselves are not appealable even when collateral to the merits. But it is not the jurisdictional nature of the issue which appellant claimed was the foundation for a Cohen appeal, but rather the fact that a right to be free from multiple litigation is irreparably impaired once the second litigation proceeds.

In Local 771, supra, 546 F.2d at 1112-13, Judges Mansfield, Gurfein and Meskill held that an appeal lay under the Cohen doctrine to vindicate a claim that a previously-held arbitration was the exclusive remedy under a collective bargaining agreement and to prevent, at the outset of the litigation, the maintenance of a second proceeding in court for the same alleged breach of contract. The Court recognized that "the Company's

right to be relieved of the costs and delays of trial, which it claims to have gained through the contract's arbitration provisions, will be lost irretrievably if proceedings in the case go forward in the district court" (at 1112).

Similarly, in Beckerman, supra, 516 F.2d at 906-07, Judges Hays, Feinberg and Holden held immediately appealable a claim to protection under the double jeopardy clause of the Constitution from a second criminal prosecution for the same act. Otherwise the defendant would be "called upon to suffer the pain of two trials" and thus irreparably lose the protection afforded him against that very evil. Id. at 906. And in United States v. Alessi, supra, 536 F.2d at 980, Judges Lumbard, Waterman and Feinberg reaffirmed the Beckerman decision.

After argument of this appeal, moreover, and too close to the date of the decision to be considered by the panel, the Supreme Court unanimously held that just this sort of irreparable injury establishes appellate jurisdiction under Cohen. The Supreme Court has now expressly affirmed the Beckerman principle, and has upheld jurisdiction to hear immediately an appeal from a claimed denial of double jeopardy protection, on the ground that the "guarantee against being twice put to trial for the same offense" would be "significantly undermined" if appellate review were postponed. Abney v. United States, supra, 45 U.S.L.W. at 4596 (emphasis the Court's).

The right claimed here by appellant -- to be protected

against multiple trials of the same claim -- comes squarely within the reasoning of this Court's and the Supreme Court's decisions.

Statement of Facts

In 1971, Clarence Ferrell, a Black employee of American Express who had been discharged, filed with the EEOC a "charge of discrimination," the jurisdictional prerequisite to any subsequent judicial action by him or by the EEOC under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.

The EEOC investigated Ferrell's charge and made a probable cause determination with respect to various allegedly unlawful employment practices in New York City, where Ferrell had been employed (16a).^{*} After the failure of conciliation procedures, the EEOC declined to bring a suit on Ferrell's charge -- as it had the right to do under §706(f)(1) of Title VII -- but instead issued Ferrell a notice of right to sue in July 1973 (20a), pursuant to §706(f)(1).

Ferrell then commenced a Title VII action against American Express in the United States District Court for the Eastern District of New York (21a). The EEOC appeared in the Ferrell action as amicus curiae but did not seek leave to

* References followed by "a" are to the Appendix to the briefs on the merits on file with this Court.

intervene, as it had the right to do under §706(f)(1) if it wished to participate in the disposition of the employee's claim or to affect the scope and course of the litigation (77a). The Ferrell action was settled. A stipulation of discontinuance with prejudice was signed by the Court on May 5, 1975, after 20 months of litigation (39a).

On April 9, 1976 (10a), American Express was served with a complaint by the EEOC alleging discriminatory practices at its offices in New York City and Washington, D.C. (3a). The EEOC conceded that the whole complaint is "jurisdictionally based on the filing of two charges, one filed by Clarence M. Ferrell and the other by Mary Reese"* (74a). The Ferrell charge is the sole basis for sweeping allegations of numerous forms of race discrimination affecting thousands of employees in New York and going all the way back to 1965, all of which the EEOC proposes to investigate and litigate in this action (4a-5a).

The litigation of the allegations of discriminatory practices in the New York City offices of American Express would involve burdensome, complex and protracted pretrial and trial proceedings involving its recruitment, hiring, promotion and

* Mary Reese was employed in Washington, D.C. The charge she filed and the investigation and findings made concerning it were wholly unrelated to the Ferrell proceedings, and were limited to Washington, D.C. (76a).

discharge practices and policies with respect to thousands of employees in New York.

American Express moved the District Court to dismiss the complaint to the extent based on the Ferrell charge on the ground that the EEOC may not maintain a second action on the same charge of discrimination which was the subject of Ferrell's lawsuit (7a). Judge Goettel denied the motion and denied certification of an appeal pursuant to 28 U.S.C. §1292(b). This appeal as of right followed.

The EEOC's motion to dismiss the appeal came on before Judges Mansfield, Gurfein and Newman, who referred the motion to the panel assigned to hear argument of the appeal. The merits of the multiple suits issue were then fully briefed by the parties.

The multiple suits issue involves a controlling and recurring question of law as to which there is a conflict of result and rationale among the six Circuits which have dealt with it. (see p. 12 below) The questions involved are important to the over-all administration of Title VII. A ruling in this case will clarify the law in this Circuit for the guidance not only of the EEOC and the employer presently before the Court, but for other employers and employees faced with similar situations. If employers are to be encouraged to settle Title VII disputes, see Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Weise v. Syracuse University, 522 F.2d 397, 412 (2d Cir. 1975), this Court should promptly resolve the fundamental question whether Title VII

does or does not allow the EEOC to bring a lawsuit after the settlement of a private action based on the same charge.

Argument

The basic fallacy in the panel's decision is its refusal to adhere to the prior decisions of this Court which hold that claimed rights to special protection from multiple litigation, whether by particular contractual, statutory or constitutional guarantees, are meaningless unless asserted violations of such rights can be appealed before the second litigation proceeds. Such a claim is not merely a claim of lack of jurisdiction. On the contrary, it sets up the right to be free at the outset from further litigation in any forum, which right can be recognized and enforced only by way of interlocutory appeal.

In this case, the panel purported to distinguish the conflicting decision in Local 771, I.A.T.S.E. v. RKO General, Inc., WOR Division, supra, 546 F.2d 1107. The first supposed distinction on which the panel relied was that appellant in Local 771 allegedly claimed that its "right to proceed in another forum [would] be irretrievably lost," and that American Express concededly made no such claim (slip op. at 4421).

No such distinction exists. No such claim was made in Local 771. Appellant in Local 771 contended that arbitration was the exclusive forum but the arbitration proceeding had already been concluded. Appellant did not seek the "right to proceed" in

arbitration. It had already done so. And it certainly did not claim that its right to proceed in arbitration would be "irretrievably lost," for it had already obtained an arbitration award in its favor.

The claim made in Local 771 was identical to the claim of American Express herein. The dispute had already been the subject of a prior proceeding (arbitration in Local 771, a court litigation in this case), and the "right to be relieved of the costs and delays of [a second] trial ... will be lost irretrievably if proceedings in the case go forward in the district court." 546 F.2d at 1112.

The second "distinction" relied on by the panel was that Local 771 involved a labor contract creating, for reasons unexplained, a "special claim to [avoid] judicial determination," and that American Express' similar claim is based on an Act of Congress rather than on a contract (slip op. at 4421). If anything, the "special claim" asserted by American Express under Title VII is entitled to even greater protection than a contract right. A right which was directly and specifically conferred by Congress in the 1972 amendments of the Civil Rights Act is at least as important as a contractual right supported by federal labor policy.

Contrary to the view of the panel in Local 771, which viewed them as "analogous," the panel in this case also attempted to distinguish the double jeopardy cases, United States v.

Beckerman and United States v. Alessi, supra, on the ground that they involved constitutional rights. At least the three Judges of this Court on the Local 771 panel do not consider the constitutional origin of the right involved in Beckerman significant. They have held that in both cases -- without regard to the source of the right in question -- "an immediate appeal was essential to protect and enforce the defendant's claim ... to be free from any further proceedings in the district court, rather than ultimately to gain a judgment in his favor after further protracted proceedings." 546 F.2d at 1112. The panel in this case has created a motley pattern of distinctions under which constitutional and contract rights are worthy of protection under Cohen while statutory rights are somehow less deserving.

The Supreme Court's recent decision in Abney v. United States, ___ U.S. ___ (45 U.S.L.W. 4594, June 9, 1977), adds strong support to the reasoning in Beckerman and in Local 771, and to the appealability of the order in this case. Chief Justice Burger held in Abney that although "adherence to [the] rule of finality has been particularly stringent in criminal prosecutions", orders refusing to dismiss on double jeopardy grounds are final decisions under 28 U.S.C. §1291 (45 U.S.L.W. at 4595).

Abney is premised on the same considerations as this Court's decisions in Beckerman and Alessi, and most recently in Local 771. The governing consideration is not the risk of inconsistent or multiple judgments, which final appeal can presumably correct, but rather the irreparable injury of having to defend

multiple litigations based on the same charge, which cannot be remedied later.

The panel, in unexplained conflict with a line of authorities in this Court called to its attention but not referred to in its opinion, also relied on the presence in the lawsuit of another claim, an unrelated charge of discrimination filed by another employee of American Express (slip op. at 4421). The happenstance that the EEOC, for its own convenience, has added this second charge arising in a different city and involving different issues (76a) has no bearing on the appealability of the order refusing to dismiss the portion of the action based on the previously litigated charge.

This Court has made it unmistakably clear that the appealability of a collateral order is not affected by the presence of another claim which remains to be litigated. Phelps v. Burnham, 327 F.2d 812, 813-14 (2d Cir. 1964); Chabot v. National Securities and Research Corp., 290 F.2d 657, 659 (2d Cir. 1961); Cutting Room Appliances Corp. v. Empire Machine Co., 186 F.2d 997, 998 (2d Cir. 1951); 6 Moore's Federal Practice, ¶5431 at 475. The injury involved is no less irreparable, and no less demanding of immediate correction, because another claim will be litigated in any event.

The panel stated (at 4419) that an appeal must present a "serious and unsettled" question to qualify for review under the Cohen doctrine, and conceded (at 4422) that the multiple suits

issue is "novel and serious". It nevertheless held, in contradiction of its own statements, that the issue is not appealable because the claimed right is not "clear" and there is controversy as to its existence (at 4422).

The panel also stated that a decision herein would not settle the issue once and for all, and thus not meet the Cohen criterion of "importance" of the decision to be made, "primarily because each [case in the other Circuits] is distinguishable on the facts" (at 4422). The panel identified no distinctions among the cases. The appellant has not claimed that there are any distinctions, and admits that three Circuits disagree with its contention, while appellee concedes that the decision of at least one Circuit, the Tenth, is "squarely contrary" to its position in this case.*

The Circuits themselves have regarded the issue as a pure question of law, and have made no attempt to point to factual differences in the cases decided by the other Circuits. For example, in Johnson v. Nekoosa-Edwards Paper Co., ___ F.2d ___, 14 FEP Cases 1658 (8th Cir. June 2, 1977), the most recent decision on the question, the Eighth Circuit summarized the prior decisions as follows: "The Fifth and Sixth Circuits allow the EEOC to file suit if the EEOC suit would be broader in scope than the private action"; "This approach was rejected by the

* See appellant's brief on the merits at 41-47 and appellee's brief at 25.

Tenth Circuit because it was unable to find any statutory basis" for it; "The Third Circuit reads the statute and the legislative history differently and places no limitation on the right of the EEOC to bring suit", leaving any problems to be resolved by consolidation of the EEOC and private suits; and the Eighth, Ninth and Tenth Circuits believe that "the express statutory scheme ... and the legislative history" bar multiple suits on the same charge of discrimination. 14 FEP Cases at 1661-62 and note 9. (The decisions to which the Court made reference are found in its opinion and in appellant's brief in this case at pp. 32-49.)

This is a clearly defined issue of law, on which the Circuits are sharply divided, which presents this Court and the Supreme Court with the opportunity to resolve an important and recurring problem under Title VII. "Since the ultimate objective is to bring before an appellate court an important question which, if unresolved, might well taint a trial, why should not this question be presented before judicial and attorney time may have been needlessly expended?" Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800, 806 (2d Cir. 1974) (in banc).

Finally, the decision in this case on appealability is the latest in a series of panel rulings which cannot be reconciled with each other. The conflicting rulings amount to a public display of deep-seated disagreement among the Judges as to the propriety of appeals under 28 U.S.C. §1291. See also United States Tour Operators Ass'n v. Trans World Airlines, Inc., slip op. 3903

at 3907-09 and n.6 (2d Cir. May 27, 1977). It is no longer possible for the bar and litigants to ascertain this Court's standards. The continuing disagreement and resulting disorder can only be resolved by the Court sitting in banc. See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., supra, at 805. An in banc hearing in this case is also a most appropriate vehicle to settle the Title VII issue in this Circuit (it has been fully briefed), and will also provide a suitable basis for certiorari.

CONCLUSION

Appellant American Express Company respectfully requests that this petition for rehearing be granted, and that the order appealed from and the merits of the multiple suits issue under Title VII of the Civil Rights Act be reviewed by this Court in banc.

Respectfully submitted,

Proskauer Rose Goetz & Mendelsohn
Attorneys for Defendant-Appellant

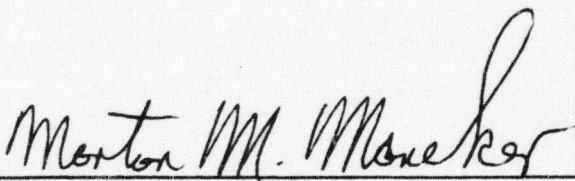
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July 7, 1977

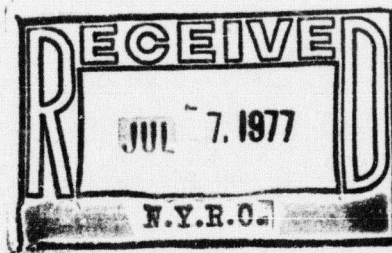
Certificate of Counsel

I certify that I have examined the foregoing petition and that in my opinion it is well-founded, and is presented in good faith and not for the purpose of delay.



Morton M. Maneker

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